JUL 27 1950

IN THE

Supreme Court of the United States

October Term, 1950.

No. 224

ANDREW MACKAY,
Petitioner,

vs.

LOEW'S INCORPORATED, a corporation,
Respondent.

SOREN P. THORSEN,
Petitioner,

vs.

WARNER BROTHERS PICTURES, INC., a corporation,
Respondent.

RALPH W. COLLINS,
Petitioner,

vs.

REPUBLIC PRODUCTIONS, INCORPORATED, a corporation,
Respondent.

C. EUGENE PARKS,
Petitioner,

vs.

R.K.O. RADIO PICTURES, INC., a corporation,
Respondent.

JOHN L. MURRAY,
Petitioner,

vs.

COLUMBIA PICTURES CORPORATION, a corporation,
Respondent.

JAMES VINCENT,
Petitioner,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Respondent.

BENNETT SIMMONS,
Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,
Respondent.

CHARLES P. HILLMAN,
Petitioner,

vs.

PARAMOUNT PICTURES, INC., a corporation,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit.

Petitioners, and each of them, in said consolidated cases [R. 96], pray that a writ of certiorari issue to re-

view the judgment of the United States Court of Appeals, for the Ninth Circuit, entered in the above entitled consolidated case on May 1, 1950.

Opinion Below.

The opinion of the District Court [R. 18], reported in 84 Fed. Supp. 676, is addressed to the original complaint for declaratory relief, and not to the amended complaint in issue [R. 2]. The opinion of the United States Court of Appeals, for the Ninth Circuit, is reported in 182 F. 2d (Adv.) 170.

Reference is made to the concurrent petitions in the *Schatte* and *Studio Union* cases, 182 F. 2d 158 and 168.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 1, 1950 [R. 101]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251(1).

Questions Presented.

Whether the like amended complaints, in the consolidated cases [R. 96], state claims upon which relief can be granted (1) "under any federal law" [R. 97], or (2) under the "law of California" [R. 98].

The Court of Appeals stated these questions, and gave its answer thereto, as follows:

> "The insufficiency of the amended complaints to state causes of action under any federal law, including Sec. 301 of the Taft-Hartley Act, 29 U. S. C. A., Sec. 185, and Sec. 7 of the National Labor Relations Act, 29 U. S. C. A., Sec. 157, is established by our decision, filed this day, in Schatte v. I. A. T. S. E., No. 12,321, 182 F. 2d (Adv.) 158, which involved

the same violations of contract alleged in this case. Section 301 of the Taft-Hartley Act is inapplicable because the alleged breaches occurred before its enactment. Section 7 of the National Labor Relations Act creates no remedy for a refusal to bargain collectively except through unfair labor practice proceedings before the National Labor Relations Board." [R. 97.]

"Since this is a diversity case, and since no claim for relief under federal law is stated, the sufficiency of the complaint must be governed by the law of California, where the actions are brought and where the execution, performance and breach of the contracts allegedly took place. The question presented is whether or not an employer who 'lays off' from work all persons employed by him who are members of a union with which he has a closed shop agreement then in force and effect, and then replaces those members with non-members, is liable in an action for damages brought by one of the individual members of the aggrieved union. We hold that under California law the employer is not so liable." [R. 98.]

Statutes Involved.

The pertinent statutory provisions are printed in Appendix A (App. pp. 1-3).

Statement.

The original complaints of petitioners, against their respective defendants, were filed on October 20, 1948, and were alike for declaratory relief [R. 2, 8]. On motion of the respective defendants, they were dismissed by the District Court on May 27, 1949, with leave to amend, for the reason stated in the memorandum opinion, *which related thereto* [R. 18].

The amended MacKay complaint for wages and damages was filed on August 3, 1949 [R. 19, 42], and the like amended complaints of the other plaintiffs were filed on August 5, 1949 [R. 43-53]. "Each complaint contains identical allegations. The cases have been consolidated on appeal for all purposes" [R. 96]. Each alleges diversity of citizenship and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 [R. 19, 43-49]. The jurisdiction of the parties is unquestioned [R. 97].

Each of the amended complaints allege that:

Plaintiff is a member of Carpenters Studio Local No. 946, of the United Brotherhood of Carpenters and Joiners of America, AFL [R. 20]. Plaintiff was employed for many years as a carpenter, by his defendant, at his defendant's motion picture studios in the Hollywood area, under the collectively bargained contracts attached to the complaint [R. 20, 24-42]. Plaintiff was laid off by his defendant, but his employment has never been terminated [R. 20].

Plaintiff was so employed and worked under the November 29, 1926, Exhibit "B-1" basic collective agreement [R. 24], as renewed, added to and extended to October 13, 1946, by the Exhibits "B-2" to "B-8", inclusive, agreements [R. 20-21, 29-36]. Said basic agreement provided machinery for hearing requests and grievances, and for the consideration and adjustment thereof [R. 25, 28].

Plaintiff was so employed under the Exhibit "B-6" closed shop agreement of December 8, 1935 [R. 20, 35]; and the successive agreements on mechanics wage scales and working conditions, each of which provided for a six-hour working day for carpenters with time and one-half

for overtime [R. 21, 32, 34, 36]. These agreements were extended to October 13, 1946 [R. 36].

Plaintiff was so employed and worked under the July 2, 1946, Exhibit "B-9" collective "Interim Agreement" [R. 21, 37-42]. Said "Interim Agreement" was made to permit the negotiation of a formal contract in further extension, renewal or modification of said long standing Exhibits "B-1" to "B-8", inclusive, agreements, which were to expire on October 13, 1946 [R. 21]. It expressly provided that it would "be entered into pending drawing up formal agreements" [R. 38], and that it was for the purpose of "covering agreements reached and effective pending the formal signing of contracts" [R. 21, 37]. It was for two years [R. 40]. It provided for a six-hour day, with time and a half for overtime [R. 22, 41].

On or about September 23, 1946, while plaintiff, and other employee members of said Local 946, were employed and at work for it, defendant ordered plaintiff, and said others, from their work tasks, and forced them to immediately leave its premises, without discharging them or terminating their employment, and assigned their work tasks to persons not members of said Local 946, and not eligible for employment in said work tasks under said contracts, and has so continued to do from said date to the present time, under a declaration of an open shop in carpentry work in said studios, and upon an eight-hour day basis, in violation of said contracts [R. 23].

Since said September 23, 1946, plaintiff, and said other employee members of Local 946, have at all times been eligible for their said work tasks, and ready, willing and able to perform the same under said contracts, but have been barred therefrom by defendant [R. 22].

Defendant has thereby deprived plaintiff of his lawful work tasks, and eligibility for the same under said collective contracts, and of his right of collective bargaining thereunder, and the benefits thereof, down to the present time. Defendant intends to continue said unlawful acts indefinitely. Plaintiff alleges damage at the rate of $100.00 per week from September 23, 1946 [R. 23].

Specification of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that the amended complaints were insufficient "to state causes of action under any federal law" [R. 97], or under "the law of California" [R. 98].

2. In holding that said complaints were insufficient under Section 301 of the Taft-Hartley Act, 29 U. S. C. A. 185 [R. 97], and the said Act is "inapplicable because the alleged breaches occurred before its enactment" [R. 98]; when the complaint alleges the continuance of the acts complained of beyond the enactment thereof [R. 23].

3. In holding that said complaints were insufficient under Section 7 of the National Labor Relations Act (re-enacted in the Taft-Hartley Act), 29 U. S. C. A. 157 [R. 97], for the reason given that this section "creates no remedy for a refusal to bargain collectively except through unfair labor practice proceedings before the National Labor Relations Board" [R. 98]; when the defendants were obligated by the Exhibit "B-9" "Interim Agreement" contract to negotiate [R. 21-22, 37-38].

4. In holding, in effect, that individual employees who had accepted employment and worked under said collective contracts, or who had otherwise accepted the same, had not thereby incorporated them in their "separate contracts of hiring" [R. 98].

5. In holding, under California law, that individual employees may *only* "sue directly on the collective bargaining contract as a third party beneficiary to enforce the provisions in the contract which have been made for his benefit" [R. 98-99], and that "the amended complaints failed to allege that appellees violated a provision of the collective bargaining contract which had been made for appellants' benefit" [R. 99]; when the violations alleged were against the individual plaintiffs [R. 22], and in violation of the contract provisions made for their benefit [R. 20-22].

6. In holding that "the wrong alleged is that appellees discharged appellants" [R. 90] when to the contrary it was alleged that:

> "* * * the defendant, nevertheless, on or about September 23, 1946, in violation thereof, ordered plaintiff, and all said other employee members of Local 946, from their work tasks, and forced them to immediately leave its premises, *without discharging them, or terminating their employment*, and assigned the work tasks of plaintiff, and all said other employee members of Local 946, to a person or persons not members of Local 946, and not eligible therefor under such contracts, and has continued so to do from said date down to the present time under a declaration of an open shop in carpentry work, in its said studios, and upon an eight hour day basis, in violation of said contracts" [R. 22-23] (italics ours).

7. In holding that "there is nothing contained in the contracts, such as a seniority clause, which limits appellees' right of discharge" [R. 99]; when the closed shop agreement [R. 20, 99], was in itself a seniority agreement.

8. In holding that the "hiring of union members only was an obligation created for the benefit of the union, not for the benefit of the individual employees as such" [R. 99]; when the unions are bargaining agents, and the individual employees, who are employed and work under the contracts, are the principal party thereto, so that it is to them the obligation runs.

9. In holding that "the damage to appellants was only that indirect damage which they may have suffered as members of the union because of the violation of the union's contract rights" and that "the union alone could seek redress" [R. 99]; when the damage was suffered by the individual employees, as the aggrieved party to the violated collective contracts, instead of the union as their agent.

10. In affirming the dismissal of said actions.

Reasons for Granting the Writ.

Each of the consolidated complaints alleges diversity of citizenship and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 [R. 19, 43-49]. The jurisdiction of the parties, therefore, is unquestioned [R. 97]. The following is submitted upon the sufficiency of the complaints to state causes of action under the laws of the United States, and under the law of California, if that should be material.

FIRST: The decision of the Court below, holding that the amended complaint does not state a cause of action under the National Labor Relations Act, nor the Labor Management Relations Act [Specifications 1, 2, 3, 4, 8, 9], is directly in conflict with the declaration of policy in Section 1 of the NLRA, and Section 1(a) of the LMRA,

and with the provisions of Section 7 of the NLRA, as re-enacted in the LMRA. Appendix A (App. pp. 1-2).

Section 1 of the NLRA (29 U. S. C. A. 151) declares it the national policy to protect "the right of employees" to "bargain collectively," and to protect them in the exercise "of full freedom" in the "designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment" and thereby declares them the principal in contracts negotiated for them. Appendix A (App. p. 1).

Section 1(b) of the LMRA (29 U. S. C. A. Supp. 141(b)) further declares it "the purpose and policy" of the Act "to prescribe the legitimate rights of both employees and employers" in further recognition of the employees as principal, and to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other," necessarily including legitimate rights under their collective agreements, and "to protect the rights of individual employees in their relations with labor organizations" in recognition that the rights of employees, as the principal in their collective agreements, come ahead of any rights of their union agents. Appendix A (App. p. 1).

Section 7 of the NLRA, as re-enacted in the LMRA (29 U. S. C. A. 157), expresses, and governs this declared purpose and policy that "employees shall have the right * * * to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for * * * and protection." Appendix A (App. pp. 1-2).

SECOND: The decision of the Court below, holding that the amended complaint does not state a cause of action un-

der any law, federal or state, on the Court's theory that the union was the principal to the collective agreements, and that the union only could be damaged by the violation thereof [Specifications 1, 2, 3, 4, 5, 7, 8, 9], is directly in conflict with the decision of the Fifth Circuit in *Yazoo & M. V. R. Co. v. Webb* (5th Cir., 1933), 64 F. 2d 902, at 903.

This *Yazoo* opinion holds, among other things, that a collective agreement "is a mutual general offer," by management and the union bargaining agent, "to be closed by specific acceptances"; and that "when the agreement is published by the managers it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed"; and that "thus a worker cannot be discharged for causes prohibited by the agreement or without a hearing if that is provided, and the agreed seniorities must be observed in promoting, laying off, or re-employing men." Appendix B (App. p. 4).

THIRD: The decision of the Court below, holding that the amended complaint does not state a cause of action under any law [Specifications 1, 2, 3, 4, 5, 7, 8, 9] is directly in conflict with *Gatliff Coal Co. v. Cox* (6th Cir., 1944), 142 F. 2d 876, which was an action by an individual employee, with diversity of citizenship, "to recover overtime compensation under the Fair Labor Standards Act and to collect wages provided for in a contract between the Coal Operations Association and the United Mine Workers of America" (p. 878).

The issue was upon the defendant's allegation "that the court was without jurisdiction of the subject matter of

appellee's cause because appellee had no justiciable rights under the bargaining agreement between the coal operators' association and the labor organization" (p. 879). The Court followed said *Yazoo* decision and held that "any person who thereafter continues in the employment of the employer or takes new employment with him becomes entitled to all the benefits of the collective agreement and incurs all of its obligations." Appendix B (App. p. 5).

FOURTH: The decision of the Court below, holding that the amended complaint does not state a cause of action under the Wagner Act [Specifications 1, 3, 4, 7, 8, 9], is directly in conflict with the decision of the Sixth Circuit in *Gatliff Coal Co. v. Cox* (6th Cir., 1945), 152 F. 2d 52, where the action arose under the Wagner Act, and where the Court adopted the opinion of the District Court, which held that "the wages, hours of work and conditions of employment of both plaintiffs, during the period of their respective employments by defendant here involved, were governed by the written collective bargaining agreements," and "that by accepting semi-monthly payments of less amount than the wages provided by the written collective agreement, they are not estopped to claim the balance due them thereunder, but are entitled to judgment for such balance." Appendix B (App. p. 6).

FIFTH: The decision of the Court below, holding that the amended complaint does not state a cause of action under the Taft-Hartley Act, for the continued violation of the collective agreement subsequent to its enactment [Specifications 1, 2], is directly in conflict with the ruling decision of this Honorable Court in *United States v. Trans-Missouri Freight Association,* and with the recent decisions of the Sixth Circuit in *NLRB v. Local 74* and

American Federation of Labor v. Western Telegraph Co., in the following particulars:

United States v. Trans-Missouri Freight Association, 166 U. S. 290 (17 S. Ct. 540, 41 L. Ed. 1007), arose from a conspiracy originating prior to the enactment of the Sherman Act, but pursued subsequent thereto. The Court held, at page 341, that the continuing actions in pursuance of the conspiracy were governed by the Act. Appendix B (App. p. 9).

NLRB v. Local 74 (6th Cir., 1950), 181 F. 2d (Adv.) 126, cites and follows said decision of the Supreme Court, and applies it to the Taft-Hartley Act, by holding, at page 131, that "Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar." Appendix B (App. p. 10).

American Federation of Labor v. Western Union Telegraph Co. (6th Cir., 1950), 179 F. 2d 535, was on appeal from an order of dismissal upon the ground that "the Court lacks jurisdiction of the subject matter" (p. 535). In reversing the order of dismissal the Court observed that "jurisdiction is not rested upon diversity of citizenship" (p. 536). The instant case, therefore, has strength in diversity that the AFL did not possess. The AFL action was brought in behalf of Mae Hart one of its members (p. 537) in reliance upon jurisdiction of the United States District Court "based on Section 301 of the Labor Management Relations Act" (p. 536). The complaint was based on two collective bargaining agreements in writing, effective respectively as of April 1, 1946, and April 1, 1947" (p. 536). It was held that these agreements "in material part annexed as exhibits to the

complaint" (p. 537), as in the instant case, fixed "the terms and conditions of all employees of appellee within the bargaining unit," including the Western Union's obligation thereunder not to "abandon or modify its existing Benefit and Pension Plan, except pursuant to mutual agreement" (p. 537).

The opinion then recites that Mae Hart, an employee of long standing, like plaintiffs in the instant case, "was on April 30, 1946, illegally and improperly removed from the rolls of the appellee company as an employee and refused further employment or a Class A pension" (p. 537), as plaintiffs in the instant case were illegally and improperly laid off, replaced, and deprived of their rights in the same year of 1946.

The AFL complaint asserted that the Western Union denied violation of the contract or provisions of the pension plan, and claimed justification in refusing to pay Mae Hart a Class A pension on the grounds that she was not on the active rolls of the company on April 30, 1946 (p. 537). The Court held "we are of opinion that the complaint clearly states a cause of action of which the United States District Court has jurisdiction" (p. 538). Appendix B (App. p. 12).

SIXTH: The decision of the Court below, holding that the complaint does not state a cause of action under the laws of California, though immaterial because jurisdiction of the subject matter exists under the laws of the United States as aforesaid, is, nevertheless, directed in conflict with the California decision cited, and with the express language of the California Code sections cited therein.

The Court below correctly stated the State interpretation of the law of California [R. 98], as follows:

> "* * * The employee, in addition to having rights under his individual contract of employment, may sue directly on the collective bargaining contract as a third party beneficiary to enforce the provisions in the contract which have been made for his benefit. Division of Labor Law Enforcement v. Dennis, 1947, 81 Cal. App. 2d 306; Sublett v. Henry's Turk and Taylor Lunch, 1942, 21 Cal. 2d 273."

But the Court below then erroneously concluded, in conflict with the California law itself, that the California law as stated did not apply to the instant case, because of the following (a) (b) (c) insupportable conclusions of the Court below:

> (a) "The amended complaints fail to allege that appellees violated a provision of the collective bargaining contract which had been made for appellants' benefit" [R. 99],

which is based upon the misconception that collective agreements are not made for the benefit of employees. Specifications 7, 8, 9.

> (b) "The wrong alleged is that appellees discharged appellants" [R. 99],

which is contrary to the express language of the amended complaint. Specification 6.

> (c) "There is nothing contained in the contracts, such as a seniority clause, which limits appellees' right to discharge" [R. 99],

which is based upon the misconception that the closed shop agreement [R. 20, 35] was not in itself a seniority agreement. Specification 7.

Div. of Lab. Law Enforcement v. Dennis (1947), 81 Cal. App. 2d 306, cited by the Court below, was an action to recover differences between wages paid employees and amounts payable under collective bargaining agreements (p. 307). The defendants "demurrer to the complaint was sustained" by the Superior Court "without leave to amend, on the ground that it appears on the face of the complaint that all claims alleged are barred by the (two-year limitation) provision of section 339 of the Code of Civil Procedure," applicable to contracts "not founded upon an instrument in writing" (p. 308).

The Appellate Court reversed the judgment of dismissal (p. 311), upon the plaintiff's contention that the action was "based upon (written) collective bargaining agreements rather than upon the oral contracts of hiring" (p. 308), and remanded the case for trial (p. 311). The United States District Court, therefore, had jurisdiction in the instant case, under the law of California, as determined in the case cited by the Court below. Appendix B (App. p. 15).

Section 1559 of the Civil Code of California, cited in said *Dennis* case opinion expressly gives this right of action. Appendix A (App. p. 3).

Section 222 of the Labor Code of California, also cited in said *Dennis* case opinion, likewise gives this right of action. Appendix A (App. p. 3).

The collective contracts, under which plaintiffs were employed and worked, and the continuing violation thereof by defendants, having been alleged, it was not necessary to plead these Code sections, nor to allege the language thereof. *United States v. Babbit,* 66 U. S. 55 (1 Black 55-62), 17 L. Ed. 94, at 96:

> "What is implied in a * * * pleading * * * is as much a part of it as what is expressed."

The Companion Cases.

The Court below refers to the companion case of *Schatte v. I.A.T.S.E.,* No. 12,321, 182 F. 2d (Adv.) 158, and bases its decision herein in part thereon [R. 97]. It is respectfully requested, therefore, that the various grounds of jurisdiction, under the laws of the United States, set forth in the concurrent petition for certiorari therein, be considered by the Court as properly applicable herein, not that they are essential to jurisdiction of the parties in this diversity case, but that they are material to the jurisdiction of the Court herein upon the subject matter, and upon the sufficiency of plaintiffs' complaints.

Like reference is respectfully made to the concurrent petition for certiorari in the case of *Studio Carpenters Local Union No. 946 v. Loew's, Inc., et al.,* 182 F. 2d (Adv.) 168.

The *Schatte* case was filed first. The Union's case and this action were filed later to further protect plaintiffs and their class from the various unsound jurisdictional contentions made by the defendants in the *Schatte* case. It

is respectfully submitted, as the view of petitioners, that jurisdiction in all of these cases should be upheld, and that thereupon they should be ordered consolidated by this Honorable Court, to permit American citizens to have their day in court, under the Constitution and laws of their country, without unnecessary delay.

Conclusion.

For the foregoing reasons, it is submitted, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ZACH LAMAR COBB,

Counsel for Petitioners.

July 21, 1950.

APPENDIX A.

LAWS OF THE UNITED STATES.

National Labor Relations Act:

Section 1 (29 U. S. C. A. 151): * * *

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 (29 U. S. C. A. 157): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, for the purpose of certed activities, for the purpose of collective bargaining or other mutual aid or protection."

Labor-Management Relations Act:

Section 1(b) (29 U. S. C. A. Supp. 141(b)): "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all

recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

Section 7 (29 U. S. C. A. Supp. 157): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 101 (29 U. S. C. A. Supp. 151); re-enacting the provision of Section 1 in the NLRA, with an addition not material here.

Section 301(a) (29 U. S. C. A. Supp. 185(a)): "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

LAWS OF CALIFORNIA.

Civil Code, "Section 1559. When contract for benefit of third person may be enforced. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Labor Code, "Section 222. Withholding part of wages established by collective bargaining. It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon."

APPENDIX B.

Yazoo & M. V. R. Co. v. Webb (5 Cir., 1933), 64 F. 2d 902, at 903:

"(2-5) An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of strike or lockout resembles in many ways a treaty. As a safeguard of social peace it ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims and ought on both sides to be kept faithfully and without subterfuge. In no other way can confidence and industrial harmony be sustained. But in itself it can rarely be a subject of court action because it is incomplete. It establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. *It is a mutual general offer to be closed by specific acceptances.* When negotiated by representatives of an organization it is called collective bargaining, but ordinarily the laws of the organization, which constitute the authority of the representatives to act, do not require the individual members to serve under it, but only that *if they serve they will do so under its terms and will join in maintaining them as applied to others. When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed. Ordinarily,* as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer

having the right to discharge at any time and the employee having the right to quit. *But the employment* though indefinite as to time is a relationship while it lasts, and *is subject to the conditions fixed in the working agreement for the industry. Thus a worker cannot be discharged for causes prohibited by the agreement or without a hearing if that is provided, and the agreed seniorities must be observed in promoting, laying off, or re-employing men.*" (Italics added.)

Cutliff Coal Co. v. Cox (6 Cir., 1944), 142 F. 2d 876, at 879:

"Appellant alleged in paragraph 1 of its answer that the court was without jurisdiction of the subject matter of appellee's cause because appellee had no justiciable rights under the bargaining agreement between the coal operators' association and the labor organization * * *"

And at 880:

"* * * It is a mutual, general offer to be closed by acceptance. When the collective agreement is signed by the individual members of the employers' association and the collective bargaining agent of the labor organization, no other contract being shown, it becomes, until abrogated, the rule of the individual employer and any person who thereafter continues in the employment of the employer or takes new employment with him becomes entitled to all benefits of the collective agreement and incurs all of its obligations." (Citing cases.)

Since appellee was employed by appellant at the time the collective agreement was entered into between the Southern Appalachian Coal Operators' Association and District No. 19, United Mine Workers of America and he thereafter continued in the employ of appellant and

there being no showing that he made any individual contract conflicting with the collective agreement, appellee's rights arising out of his employment by appellant and the wages due him, if any, must be measured by the collective agreement. Appellee had the right under the circumstances here appearing to maintain the present action.

Gatliff Coal Co. v. Cox (6 Cir., 1945), 152 F. 2d 52, adopts the decision of the District Court, and at 52:

"These actions involve common questions of law and similar issues of fact. By agreement of the parties, for the purpose of trial, these were consolidated and tried by the Court without the intervention of a jury."

And at 53:

"* * * The plaintiffs were employed by defendant in operating its power house which furnished the power for the operation of all the mines, plaintiff Maynard Cox being an engineer and Ora L. Jones a fireman. Cox's employment covered the period from April 1, 1941, to and including March 31, 1943, and Jones worked from April 1, 1941, to and including June 30, 1942.

"Prior to April 1941, the defendant's employees were unorganized and defendant's mines were operated under a non-union open shop policy. During early April 1941 the employees were organized and plaintiffs, along with other employees, became members of the miners' union known as District 19, United Mine Workers of America, which will be hereinafter referred to as the Union. * * *"

"The participants in the wage conference at Washington, recognizing the fact that negotiations as to the new collective agreement would be prolonged, and desiring to promote the National defense program by ending the pend-

ing strike, on April 30, 1941, entered into a temporary agreement to be effective during the negotiations and until final conclusion of a new agreement. * * *"

And at 55:

"According to a transcript from defendant's books filed in the record which, pursuant to an order made at pre-trial conference, is accepted by the parties as correct, at the hourly rate for regular time and overtime as provided in the District Agreement, the plaintiff Maynard Cox earned a total of $4285.35 for regular time and a total of $5862.17 for overtime, for which defendant paid him only $1597.43 on account of regular time and $2181.63 on account of overtime.

"According to the same records, at the hourly rate for regular time and overtime, as provided in the District Agreement, the plaintiff Ora L. Jones earned a total of $2245.34 for regular time and a total of $2389.39 for overtime, for which defendant paid him only $1058.89 on account of regular time and $1105.33 on account of overtime.

"The payments so made to the plaintiffs, while substantially below the rates provided by the District Agreement, were more than the minimum rates required by Section 6 of the Fair Labor Standards Act (29 U. S. C. A. sec. 206) for regular time and included one and one-half thereof for overtime.

"The plaintiffs seek judgment for the balances due them, respectively, under the terms of the District Agreement * * *"

And at page 56:

"(1) During the period involved in this litigation, the rights and duties of the parties as employer and employees

were subject to the provisions of the 'National Labor Relations Act' (29 U. S. C. A. Secs. 151-166) * * * and in so far as these Acts of Congress are pertinent to the issues here involved they are controlling.

"The so-called 'District Agreement' was a valid collective bargaining agreement within the meaning of the National Labor Relations Act and is entitled to the protection which it affords.

"(2) *In utilizing collective bargaining agreements* to implement a National labor policy designed to remove certain recognized sources of industrial strife by encouraging friendly adjustment of industrial disputes as to wages, hours of work and other conditions of employment, upon a plane of equality of bargaining power between employers and employees, *the National Labor Relations Act, in the public interest, has given such collective bargaining agreements a more secure and stable position in our National economy than that of ordinary common law contracts* which may be altered at pleasure *by rendering ineffectual* and unavailable *any collateral agreements* between individual members of the collective bargaining group *designed to obtain a diminution of the obligations* of a particular employer *or abridgment of the benefits accruing to* particular *employees under the collective agreement,* regardless of the circumstances that may be relied upon to justify them or the terms there. *To hold otherwise '* * * would reduce the National Labor Relations Act to a mere futility and leave collective agreements no stronger than the weakest members of the union.'* J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762. Statutes requiring collective bargaining would have little substance if what was made collectively could be promptly unmade individually. Order of

Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 346, 64 S. Ct. 582, 88 L. Ed. 788. (Italics added.)

"(3) The Act also contemplates that a collective bargaining agreement be in writing. * * *"

"(4) It thus appears that the National Labor Relations Act clearly precludes defendant's reliance upon the prior or contemporaneous oral agreement upon which its defense to these actions is based.

"(5) *I am of the opinion that the wages, hours of work and conditions of employment of both plaintiffs,* during the period of their respective employments by defendant here involved, *were governed by the written collective bargaining agreements,* which defendant signed, *and that* by accepting semi-monthly payments of less amount than the wages provided by the written collective agreement, *they* are not estopped to claim the balance due them thereunder, but *are entitled to judgment for such balance."* (Italics added.)

United States v. Trans-Missouri Freight Association, 166 U. S. 290 (17 S. Ct. 540, 51 L. Ed. 1007), at the pages indicated:

"On the 2d of July, 1890, an act was passed by the Congress of the United States, entitled 'An Act To Protect Trade and Commerce against Unlawful Restraints and Monopolies.'" (p. 291.)

"On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill, made and entered into an agreement by which they formed themselves into an association to be known as the 'Trans-Missouri Freight Association,' and they agreed to be

governed by the provisions contained in the articles of agreement." (p. 292.)

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract that the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provision of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise." (p. 342.)

National Labor Relations Board v. Local 74 Etc. (6 Cir., 1950), 181 F. 2d (Adv.) 126, at 127:

"The National Labor Relations Board seeks enforcement of its order directing Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and its

business agent, Jack Henderson, to 'cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson, doing business as Watson's Specialty Store.'

"The authority for issuance of the Board's order is rested upon the following provisions of section 8(b) (4) (A) of the Labor Management Relations Act of 1947, * * *"

And at 131:

"(5) The respondents contend that their decision taken during working hours on August 21 to discontinue work at Stanley's residence in accordance with the working rules and practices of the union was a concerted decision not to return to work the next day, and that therefore, inasmuch as section 8(b) (4) (A) did not become effective until the following day (August 22), the section has no application and the Board lacked jurisdiction to enter the order which it did. Much reliance is placed upon the decision of United States District Judge Darr, who, in denying a temporary injunction sought by a regional director of the National Labor Relations Board to restrain the respondent union from maintaining a secondary boycott against the Ira A. Watson Company, said that in his judgment 'the whole employment relationship ceased to exist on August 21, 1947, and that when the Act became effective there was no unlawful situation'; and that the whole incident was closed."

And at 131:

"Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar. In Jefferey-De Witt Insulator Co. v. National Labor Relations Board, 4 Cir., 91 F. 2d 134, 112 A. L. R. 948, certiorari denied 302 U. S. 731, 58 S. Ct. 55, 82 L. Ed. 565, it was held that the mere fact that a labor dispute began before the enactment of the National Labor Relations Act does not have the effect of withdrawing either the parties or the dispute from the regulatory power of Congress as to subsequently occurring acts. As early as 1897, the Supreme Court applied the same principle in holding that an agreement to establish and maintain future rates for transportation, though lawful when made, constituted a violation of the Sherman Anti-Trust Act, 15 U. S. C. A. Sec. 1 *et seq.*, when continued in operation after certain provisions of the agreement became unlawful in consequence of the Sherman Act. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007." (Italics added.)

American Federation of Labor v. Western Union Telegraph Co. (6 Cir., 1950), 179 F. 2d 535:

"Action by American Federation of Labor against the Western Union Telegraph Co. for alleged breach of collective bargaining agreement for a declaratory judgment.

"The United States District Court for the Northern District of Ohio, Eastern Division, Paul Jones, J., dismissed the action for want of jurisdiction and the plaintiff appealed.

"The Court of Appeals, Martin, Circuit Judge, held that the complaint stated a cause of action under both the Labor Management Relations Act and the Federal Declaratory Judgment Act."

And at 536:

"At the outset, it should be observed that jurisdiction is not rested upon diversity of citizenship. In its first numbered paragraph, the complaint asserts that jurisdiction of the United States District Court is based on section 301 of the Labor Management Relations Act, 1947, * * *"

"(1) It is well settled that a motion to dismiss for failure to state a claim should not be granted, unless it appears certain that the plaintiff would not be entitled to relief under any set of facts proved in support of his claim as stated. * * *

"The complaint alleges that appellant and appellee entered into two collective bargaining agreements in writing, effective respectively as of April 1, 1946, and April 1, 1947. Both agreements, in material part annexed as exhibits to the complaint, fix the terms and conditions of employment of all employees of appellee within the bargaining unit, including employees in the Cleveland office. The Agreement of April 1, 1947, has by mutual agreement been amended from time to time in certain respects not germane to this proceeding. *In both collective bargaining agreements, it is expressly provided that, during the life of the agreement, the Western Union Telegraph Company will not abandon or modify its existing Benefit and Pension Plan, except pursuant to mutual agreement.* * * *"

And at 537:

"The complaint charges that despite the fact that Mae Hart was fifty-five years, five months and fourteen days of age, with a service record in the employ of Western Union of twenty-one years and eleven and one-half months, and so qualified for a Class A pension under the provisions of the Benefit and Pension Plan, she was on April 30, 1946, illegally and improperly removed from the rolls of the appellee company as an employee and refused further employment for a class A pension. It is alleged that Mae Hart is ill, destitute and dependent upon charity and contributions from friends and relatives for the necessities of life, because of the illegal and improper refusal of appellee to pay the pension to which she is entitled; and that she has sustained both mental and physical suffering as the result of the illegal refusal of the appellee to comply with its contractual obligations to her and to the American Federation of Labor.

"The complaint asserts that Western Union denies that it has violated its contract or the provisions of the pension plan, that it claims justification in refusing to pay Mae Hart a Class A pension on the grounds that she was not on the active rolls of the company on April 30, 1946, when her Class D or sickness disability pension expired and that, in any event, the Pension Committee had uncontrolled discretion to refuse her or any other employee a pension on any grounds whatsoever. * * *"

And at 537:

"The prayer of the complaint is that the court entertain the action and enter judgment declaring that Mae Hart is entitled to a Class A pension effective May 1, 1946, making her whole for injuries suffered because of

the illegal actions of the defendant; that the court permanently enjoin the defendant from 'in any manner breaching and violating the provisions of said pension plan insofar as it affects Mae Hart or any other employee represented by the plaintiff'; and that the court grant such other and further relief as it deems just.

"(2) We are of opinion that the complaint clearly states a cause of action of which the United States District Court has jurisdiction. The action is one for violation of contract between appellant and appellee within the express provisions of section 301(a) of the Labor Management Relations Act of 1947; * * *"

Division of Labor Law Enforcement, Department of Industrial Relations v. V. R. Dennis, 81 Cal. App. 2d 306, at pages indicated:

Action to recover difference between wages paid employees and amounts payable under collective bargaining agreements. Judgment for defendant after sustaining demurrer to complaint without leave to amend, reversed with directions (p. 307).

(1) The sole question presented is whether the two-year statute (Code Civ. Proc., Sec. 339) or the four-year statute (Code Civ. Proc., Sec. 337) is here applicable. The appellant contends that the action is based upon these collective bargaining agreements rather than upon the oral contracts of hiring; * * * On the other hand, the respondent contends that an action against an employer by an individual employee, under a verbal contract of hiring, to enforce a written collective bargaining agreement is governed by the provisions of section 339, Code of Civil Procedure, and is barred within two years after the cause of action accrues (p. 308).

While conceding the right of an employee to maintain a suit under these circumstances, the respondent contends that the collective bargaining agreement and the individual contract of hiring are separate and distinct contracts as held in *J. I. Case Co. v. National Labor Relations Board,* 321 U. S. 332 (64 S. Ct. 576, 88 L. Ed. 762); *Rentschler v. Missouri Pacific R. Co.,* 126 Neb. 493 (253 N. W. 694, 95 A. L. R. 1); and *Yazoo & Mississippi Valley R. Co. v. Webb,* 64 F. 2d 902, and as recognized in *Levy v. Superior Court,* 15 Cal. 2d 692 (104 P. 2d 770, 129 A. L. R. 956); that a collective bargaining agreement is incomplete in itself, furnishing no basis for a right of action to an individual employee; and that the employee's cause of action to recover such wages must, of necessity, arise out of his separate contract of employment, which in this case was verbal (p. 308).

* * * White it was held in *Levy v. Superior Court,* 15 Cal. 2d 692 (104 P. 2d 770, 129 A. L. R. 956), that a collective bargaining agreement, covering the duties or obligations to be observed between the employer and the union, is distinct and separable from a contract of hiring, the fact that these are separate and distinct contracts is not necessarily controlling on the question here presented. The effect of section 1559 of the Civil Code, providing that a contract made expressly for the benefit of a third person may be enforced by him, must be considered. In actions brought under the section it frequently happens that two separate and distinct contracts are involved, but this has not prevented the action from being considered as one brought on the contract made for the benefit of the third party, although he also had another contract with one of the parties to the contract sued upon, and it has been held

in a number of such cases that the four-year limitation applied (p. 309).

* * * Not only is such an employee a member of the class beneficially interested under such a collective bargaining contract but he seems to be given a direct statutory interest therein by section 222 of the Labor Code, which provides that it is unlawful to intentionally withhold from him any part of the wage provided for in such an agreement (p. 310).

While the point was not directly involved or decided therein, the conclusion that the four-year statute is applicable under the circumstances of this case is inferentially supported by the decision in *Sublett v. Henry's etc. Lunch,* 21 Cal. 2d 273 (131 P. 2d 369) (p. 311).

For the reasons given the judgment is reversed, with directions to permit the respondent to answer within a reasonable time (p. 311).